IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-729

MARY JANE ANDERSON,
AUDREY L. BURKE, et al.,

Petitioners,

v.

BOARD OF EDUCATION, PRINCETON CITY SCHOOL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

DINSMORE, SHOHL, COATES & DEUPREE
GREGORY L. HELLRUNG, ESQ.
HAROLD S. FREEMAN, ESQ.
STEPHEN S. EBERLY, ESQ.
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202

RENDIGS, FRY, KIELY & DENNIS
ROBERT M. GALBRAITH, ESQ.
907 Central Trust Tower
5 West Fourth Street
Cincinnati, Ohio 45202
Attorneys for Respondent

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-729

MARY JANE ANDERSON,
AUDREY L. BURKE, et al.,

Petitioners,

v.

BOARD OF EDUCATION, PRINCETON CITY SCHOOL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Respondent, Board of Education, Princeton City School District, opposes the Petition for a Writ of Certiorari for the reasons presented herein.

OPINION BELOW

The Court of Common Pleas for Hamilton County, Ohio, rendered a memorandum opinion on March 5, 1974, which was not reported. (Appendix A, *infra* p. 20).

QUESTIONS PRESENTED

1. Whether Petitioners have an interest in property or liberty cognizable under the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Ferguson Act, Chapter 4117 of the Ohio Revised Code, which was invoked by Respondent against certain of its public employees during a strike, is a deprivation of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States on its face?

3. Whether the Ferguson Act, as applied by Respondent in this case, is a deprivation of due process of law contrary to the Fourteenth Amendment to the Constitution of the United States?

PERTINENT STATUTORY PROVISIONS

The text of Chapter 2506, Ohio Revised Code, which is a relevant statutory provision not set forth in the Petition for a Writ of Certiorari is contained in Appendix B, *infra* p. 22.

COUNTER-STATEMENT OF THE CASE

The bus drivers of the Princeton City School District sought in January, 1972, to have the Board of Education of the District recognize the Ohio Association of Public School Employees ("OAPSE") as the bargaining agent for the bus drivers only to collectively negotiate their terms and conditions of employment. This demand was specifically made in a telegram to the President of the Board received on January 15, 1972. It went on to state that the drivers would strike if the demand was not granted. The Board did not recognize OAPSE as a bargaining agent for the drivers. It is undisputed that on January 24, 1972,

the fifty-five Petitioners and other drivers did not report to work and that picketing was in progress for at least two weeks at various school buildings in support of the demand for recognition.

On January 24, 1972, and thereafter, the Board sent a letter invoking the Ferguson Act, to sixty drivers who did not report for work. Pursuant to Section 4117.04, Ohio Revised Code, each of the Petitioners and the other drivers requested a hearing to establish that he or she did not violate the Ferguson Act. Such hearings were scheduled and notices of them were sent by the Board to each involved employee and his or her attorney, if there was one.

The general format of each of the sixty hearings was the same. Initially, objections to the hearings were raised by counsel for the Petitioners and were overruled. Counsel for the drivers then sought to examine each Board member as to his "fairness and openmindedness. . . ." This request was denied.

Each hearing then proceeded with the presentation by counsel for the Board of evidence that the involved driver had violated the Ferguson Act. Each such witness was subject to cross examination by counsel for the Petitioners.

Each driver was then given an opportunity to testify or present other evidence. However, none of the Petitioners chose to take the witness stand and testify under oath or to present other evidence to establish that they were not on strike or to rebut, contradict or otherwise dilute the evidence already adduced about their actions. Instead, each offered to read a "statement" while refusing to take the witness stand or the oath. The objection to this "procedure" was sustained, although it was clearly emphasized that each driver could take the stand and give sworn testimony relevant to the subject matter of the hearing.

Each Petitioner refused to do this. Although the Petition for Certiorari now before this Court (*Petition* at p. 5)

and the opinion of the Court of Appeals (*Petition*, Appendix A, at p. 23) erroneously state that petitioners "statement" was not read, the "statement" was proffered and read to the Board by counsel for Petitioners.

Thereafter, the Board issued individual written decisions in each of the sixty cases setting forth the facts and conclusions as found by the Board in each case. With respect to the fifty-five Petitioners herein, the Board found that the individuals had violated the Ferguson Act by engaging in an illegal strike. In four other instances the Board found that individual drivers had not violated the Ferguson Act. In one other instance, although the Board found that the individual had violated the Act, that driver did not appeal the Board's decision and is not a Petitioner.

Petitioners thereafter appealed the Board's decision according to the Ohio Administrative Procedure Act, Chapter 2506, Ohio Revised Code, to the Court of Common Pleas for Hamilton County. The Common Pleas Court did not permit the introduction of any additional evidence, and in a memorandum opinion affirmed the Board's decisions in all fifty-five cases. Petitioners then appealed to the Court of Appeals for the First Appellate District, Hamilton County, Ohio, which affirmed the decision of the Common Pleas Court in a decision issued on May 19, 1975. The Supreme Court of Ohio upheld the Court of Appeals by dismissing Petitioners' appeal on September 12, 1975.

REASONS FOR DENYING WRIT

The facts of this case present neither a federal question of substance upon which this Court has not yet spoken nor a federal question of substance decided in conflict with the decisions of this Court. The following portions of this Brief support these contentions.

I.

SINCE PETITIONERS HAVE NO PROPERTY RIGHT AND THEIR LIBERTY HAS NOT BEEN INFRINGED, PETITIONERS ARE NOT ENTITLED TO THE CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW.

A necessary prerequisite to Petitioner's invocation of any right to due process under the Fourteenth Amendment to the Constitution of the United States is the existence of property rights in which they have an interest or some circumspection of their liberty. It is well settled that such property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). See also *Arnett* v. *Kennedy*, 416 U.S. 134, 185 (1974) (dissenting opinion, White, J.). Thus, Ohio law determines the existence of any property right in the instant case.

Petitioners point to their Civil Service status under Ohio law as a basis for arguing that they possess a property right in continued employment. (*Petition*, at pp. 8-9). However, the Civil Service rights of public employees in Ohio are pre-empted with respect to strike activities by the provisions of the Ferguson Act, Chapter 4117, Ohio Revised Code. *Bell* v. *Board of Trustees*, 21 Ohio App. 2d 49, 254 N.E.2d 711 (1969). A similar result was reached in *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, 390 F.Supp. 103 W.D. Mich., 1974), rev'd on other grounds, 518 F.2d 1091 (6th Cir., 1975), where a Michigan statute governing collective bargaining and labor relations, rather than tenure or employment contracts, was held to be the sole source of any rights of striking employees.

Thus, if Petitioners possess a property right in the circumstances of this case, it arises from the Ferguson Act.

The Ferguson Act, however, provides only a right to a hearing before the Board on the limited issue of whether they had been on strike. The Board held such a hearing and the evidence presented by the Board showed that Petitioners had, in fact, been on strike. Petitioners received that to which they were entitled. The full panoply of rights encompassed in the phrase due process is not constitutionally compelled in these circumstances. As the Court of Appeals in *Lake Michigan College*, supra at 1095, stated, "If the . . . [statute] instills any expectation in public employees, it is that they will be terminated . . . according to specified procedures if they go on strike." Here, Petitioners were discharged in accordance with the procedures of the Ferguson Act. They were entitled to no more. See *Arnett* v. *Kennedy*, supra.

Petitioners argue, further, that they are entitled to due process because their Ferguson Act discharges limit their "liberty" to seek other employment or to form other associations in the community. In *Roth*, supra, this Court held that the mere failure to renew an employment contract without any allegation affecting the employee's good name, reputation, honor or integrity does not impinge on any liberty protected. In *Michigan College*, supra at 1097, the Sixth Circuit held that the discharge of public employees under a statute similar to the Ferguson Act did not raise any inference that the discharged employee's liberty would be diminished. As in that case, the Ferguson Act discharge did not discredit their "honesty, morality and integrity or . . . [damage] their standing in the community." *Id.* Since Petitioners had advertised by their picketing that they were on strike, the finding that they were on strike and the subsequent discharge solely on that basis did not diminish their liberty beyond what they, themselves, had done.

Thus, Petitioners have no liberty or property rights to be protected by the Constitution, their due process arguments are groundless, and their Petition should be denied. The remainder of this Brief assumes, arguendo, that Petitioners did possess some interest in liberty or property and shows that, even if that were the case, the Ferguson Act hearings did not deprive them of any right guaranteed by the Fourteenth Amendment.

II.

THE FERGUSON ACT, CHAPTER 4117, OHIO REVISED CODE, IS NOT UNCONSTITUTIONAL ON ITS FACE AS A DENIAL OF DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Ohio, strikes by public employees are proscribed by Section 4117.02, Ohio Revised Code, which provides: "No public employee shall strike." Sections 4117.01 through 4117.05, inclusive, Ohio Revised Code, provide sanctions which may be invoked against striking public employees. These sanctions ultimately lead to the termination of the striking public employee. Section 4117.05, Ohio Revised Code.

It is clear that public employees, including bus drivers, have no constitutionally protected right to strike. *United Federation of Postal Clerks* v. *Blount*, 325 F.Supp. 879 (D.D.C., 1971), aff'd 404 U.S. 802 (1971); *Bennett* v. *Gravelle*, 323 F.Supp. 203 (D. Mar., 1971), aff'd 451 F.2d 1011 (5th Cir., 1971), cert. den. 407 U.S. 917 (1972); *Anderson Fed. of Teachers* v. *School, City of Anderson*, 251 N.E.2d 15 (S.Ct. Ind., 1969), cert. den. 399 U.S. 928 (1970). The common law rule is that strikes by public employees are illegal in the absence of a statute specifically permitting them. *Bennett* v. *Gravelle*, *supra*. As is the case

in Ohio, such strikes are prohibited by statute in a substantial number of states. Thus, the purpose of the Ferguson Act, to make strikes by public employees illegal and to provide sanctions for the violation of this proscription, is not constitutionally infirm.

The Ferguson Act is initiated by the mailing of a "notice that he is on strike" to the employee by his "superior." Section 4117.04, Ohio Revised Code. Respondent invoked that statute in its January 24, 1972 letter to the drivers. Each employee then requested hearings pursuant to Section 4117.04, Ohio Revised Code, to "establish that he did not violate" the Ferguson Act. Such statutory hearings are to be conducted by the "officer or body having power to remove such employee." Section 4117.04, Ohio Revised Code. Under Ohio law the "superior" and the "officer or body having power to remove" may be the Board of Education. *Abbott* v. *Myers*, 20 Ohio App.2d 65, 251 N.E.2d 869 (1969).

Petitioners' fundamental contention is that it is constitutionally impermissible for the respondents to both send the notice "deeming" the petitioners to be on strike and, later, to sit in judgment of whether individual petitioners were engaged in the strike. They argue that since Ohio law permits this to occur, the law is unconstitutional on its face for combining the roles of prosecutor and judge.

Petitioners' argument to this effect mistakes the basic nature of the statutory notice. In order to send the statutory notice that the petitioners were "deemed" to be on srike, the Board had only to determine that a strike was in progress and that the individual to whom the notice was sent was absent from work. There was no need to pre-judge whether a particular individual was on strike. The sending of such notices does not show any prediliction by the Board to find that a particular public employee was

on strike. Therefore, the statutory scheme is not void as unconstitutional.

The actual results of the statutory hearings support their constitutionality. In four instances wherein the drivers did introduce evidence as to their not being on strike, the Board evidenced its lack of bias by finding that these individuals, to whom notices had been sent, were not engaged in the strike.

In *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948), this Court held that preconceptions by the members of the FTC that "the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade . . . did not necessarily mean that the minds of its members were closed on the subject of the respondent's base point practices." *Id.* at 700-701. Thus, this Court recognized that the mere fact that as a general matter the FTC believed a certain pricing practice to be contrary to law did not mean that they were biased with respect to the decision to be made concerning a particular pricing practice. Similarly, the mere fact that Respondents in the instant case had determined that a strike was in progress and, therefore, issued the statutory notice, does not support the argument that they had prejudged whether any particular individual was, in fact, participating in the strike.

Another illustration of this principal is *Duke* v. *North Texas State University*, 469 F.2d 829 (5th Cir., 1972), cert. den. 412 U.S. 932 (1973), where the court upheld a teaching assistant's dismissal. The teaching assistant received notice of her termination in a letter from the university's acting president. The letter also stated that she would be afforded an administrative hearing before the President's Cabinet, composed of the acting president and three vice presidents. At the hearing the teaching assistant

was represented by counsel and had the opportunity to present evidence and cross-examine witnesses. The decision makers determined not to rehire her and made written findings as the basis for its decision.

This procedure is almost identical to that employed by the Board in this case. In *Duke* it was challenged as denying due process of law to the teaching assistant involved, but the Court stated in finding no deprivation of constitutional rights:

> "We decline to establish a per se rule that would disqualify administartive hearing bodies such as the President's Cabinet from hearing internal university matters solely for the reason that the members are employees of the Board and because some of them participated in the initial investigation of the incident and initiation of the cause under consideration.
>
> * * * * *
>
> We are satisfied that the record here clearly demonstrates that Mrs. Duke received procedural due process of law." *Id.* at 834.

The acting president's original dismissal letter in the *Duke* case related to a single individual's conduct. Therefore, the chances of bias and prejudgment were greater in *Duke* than in the instant case where the Board had only to decide that a strike was in progress. Still, the Fifth Circuit found that there was no deprivation of constitutional rights.

Although this issue was not raised to a constitutional level in *Arnett* v. *Kennedy*, supra, at 155-156, n.21, it is clear that the majority would permit the individual making the initial determination that dismissal may be appropriate to gather evidence and make the final judgment of discharge. In addition, the plurality would find no constitutional violation based on this procedure and in light of the other safeguards present. *Arnett* v. *Kennedy*, supra at

164-171. In the instant case, the grounds upon which to make an inference of bias are even more tenuous, and in any case sufficient safeguards were present. Ultimately, of course, Petitioners obtained review with the ability to introduce erroneously excluded evidence in the Ohio judicial system. Chapter 2605, Ohio Revised Code.

Petitioners cite a series of cases in support of their position. Respondent does not dispute the efficacy of the general principles stated in these cases. However, these principles of law were generated and applied in factual situations markedly different from those involved in this case.

The direct personal involvement or interest of the judicial or quasi-judicial decision maker in the outcome of the case may be sufficient to support disqualification. This interest may be financial. See *Tumey* v. *Ohio*, 272 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). Or the interest may be personal in nature, as where the decision maker and the affected individual have been involved in demonstrations of personal animosity. See *In re Murchison*, 349 U.S. 133 (1955); *Offutt* v. *United States*, 348 U.S. 11 (1954); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *In re Contempt of Common Pleas Court, Probate Division*, 30 Ohio St.2d 182, 283 N.E.2d 126 (1972). No such personal interest of either of these types may be appropriately inferred in this case from the mere fact that the members of the Board sent the notice that a strike was in progress and later presided over the statutory hearings to determine whether a particular employee took part in the strike.

In other cases the constitutional vice was that no hearing of any sort was convened before the individual's rights were affected. Cases of this type are *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); and *Morgan* v. *United States*, 304 U.S. 1 (1938).

In the instant case Petitioners had a full hearing before any decision was made. They and their counsel had received written notice of the hearing setting forth its purpose. The hearing was public and Petitioners were confronted with the evidence against them. They cross-examined witnesses against them and were then afforded an opportunity to present evidence on their behalf. The decisions and findings of the Board were presented in writing, and Petitioners were entitled to and took advantage of the review of these decisions in the Courts of Ohio.

Still other cases cited by petitioners involve situations in which the right to a fair hearing was denied because the decision of the tribunal did not rest upon evidence presented at the hearing, even though a hearing was conducted. *Ohio Bell Telephone Company* v. *Public Utilities Commission*, 301 U.S. 292 (1937); *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1)*, 294 U.S. 63 (1935); *West Ohio Gas Co.* v. *Public Utilities Commission (No. 2)*, 294 U.S. 79 (1935); and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 (1936). Respondent's decisions here were based solely on the evidence adduced at the hearings; thus the cases cited by Petitioners are inapplicable. And none supports the contention that the Ferguson Act is unconstitutional on its face.

For these reasons, the Board's dual role of sending the statutory notices to invoke the Ferguson Act, and the later holding of an evidentiary hearing to determine whether, in fact, particular individuals were engaged in the strike, does not result in per se bias or prejudice. Therefore, the Ferguson Act is constitutional on its face.

III.

THE FERGUSON ACT, AS APPLIED IN THIS CASE, DOES NOT RESULT IN A DENIAL OF DUE PROCESS BY FAILING TO PROVIDE A FAIR HEARING TO PETITIONERS.

A. Respondent Did Not Violate Petitioner's Right to Due Process by Conducting Ferguson Act Hearings after Refusing to Recognize a Union as Their Collective Bargaining Agent.

The focus of this issue is very similar to the question presented in the previous section. Petitioners argue that the Board had been engaged in a colliquy with them concerning the recognition of a union as a collective bargaining agent for bus drivers only, and that as a result the Board was antagonistic toward the strikers, and therefore, had prejudged the question of each individual's participation in the strike. This, they argue, is a denial of constitutionally required due process.

This argument is founded on the false assumption that the Board will prejudge everyone to whom notices were sent in order to seek vengeance against those who were engaged in the strike. The Sixth Circuit has recognized the invalidity of the assumption. In *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College*, 518 F.2d 1091 (6th Cir., 1975), the court held that there was no constitutional right to due process where a public employee has neither a property right in re-employment nor suffers an infringement of liberty because of a denial of re-employemnt. The court went on to state, in circumstances equivalent to this case, as a substantial alternative basis for its result that the termination hearings would meet "minimum constitutional standards." *Id.* at 1098.

The constitutional flaw complained of there was that the Board, as part of the administration which was unable to

reach a wage agreement with striking teachers, must be biased and, therefore, may not conduct hearings similar to Ferguson Act hearings without denying due process of law. The court responded as follows:

> "The only issue [in such a hearing] will be one of fact—whether a particular employee in fact participated in the strike. The Board's sole objective in conducting the . . . [statutory] hearings is to ensure that innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly.
>
> * * * * *
>
> Moreover, even if the Board members were hostile toward the Union and the striking faculty, this animosity would hardly manifest itself in the form of an unfair decision against a teacher who did not participate in the strike. [T]he District Court's finding of bias cannot stand. Further the statute . . . provides for a judicial review in the State Circuit Court from an adverse decision following a . . . [statutory] hearing." *Id.* at 1099.

This quotation is equally applicable to the instant case and supports Respondent's contention that the procedure followed by the Board did not deny bus drivers due process. The Board would not find an individual, who was not engaged in the strike, to have been engaged in the strike, because of prejudice against those who did strike. That they did not do so is shown by the fact that four individuals, to whom Ferguson Act notices were sent, were found not to have engaged in the strike.

In fact, due process was observed at the hearing. Both sides were represented by counsel. A record of the proceedings was transcribed. Both sides were afforded the opportunity to confront and cross-examine witnesses who presented evidence against them. Both sides were provided

with an opportunity to be heard. The Board made written findings of fact, which were the basis for its written conclusions. Petitioners had, and employed, the right to appeal the Board's decision into the Ohio judicial system where an appeal hearing provided the additional opportunity to adduce any evidence improperly excluded by the Board. A hearing under these circumstances, on the issue of whether or not a particular employee was actually engaged in a strike, does not violate due process merely because the decision maker was the employer of the Petitioners and had opposed the recognition of a union as their collective bargaining agent. This relationship does not show nor mandate the inference that the Respondents would be biased on the issue of whether a particular individual was engaged in the strike and this was the only issue at the hearing.

Finally, Petitioners note the recent case of *Hortonville Education Assn.* v. *Hortonville Joint School District No. 1*, 66 Wis.2d 469, 225 N.W.2d 658 (1975). The Wisconsin Supreme Court held, interalia, that teachers discharged for striking were denied due process because hearings were conducted by school board members who had been engaged in the bargaining process. However, the facts in *Hortonville* were substantially different than here. First, there was no statutory procedure governing hearings for striking public employees as there is in Ohio.

Second, at the hearing the school board presented no evidence upon which to base its findings that the teachers were on strike, but instead used the presumption they were on strike and placed the burden on the teacher to show that this was not true. In the instant case, even though it would appear that the Ferguson Act placed such a burden on the bus drivers, the Board counsel assumed that burden and went forward with evidence showing that each of the Petitioners had, in fact, been striking. Thus, the record of

the hearings here provide a sufficient evidentiary basis for their discharge.

Third, in Wisconsin there does not appear from the record to have been any appeal route into the state judicial system. On that basis the Wisconsin Supreme Court fashioned a remedy of a hearing in the state trial court. This remedy, however, recognizes that the initial determination would be appropriately made by the school board. *Id.* at 673. Here, Ohio law provides for the review of any Ferguson Act discharge and for the introduction of additional evidence. Section 2506.03, Ohio Revised Code, provides that the Common Pleas Court is to proceed with the hearing on such review as in the trial of a civil action. This statute also provides that the Court had the authority to consider additional evidence if Petitioners had shown that Respondent had wrongfully denied their right to present their "position arguments and contentions," to "offer and examine witnesses," to "cross-examine witnesses purporting to refute" their position, to offer evidence to refute evidence and testimony offered in opposition to "their position," or to "proffer any such evidence into the record, if the admission thereof" was denied.

This Court has granted the Hortonville school board's Petition for Certiorari, No. 741606, to review the Wisconsin Supreme Court's decision in *Hortonville*, supra. The facts of the instant case are substantially dissimilar and, therefore, *Hortonville* provides neither support for Petitioner's argument of bias nor support for the granting of the Writ in this case.

B. The Denial of the Opportunity to Examine the Board to Determine Whether There Is any Actual Bias Does Not Deny Due Process of Law.

Petitioners argue that it was a denial of due process for the Board to deny them the opportunity to cross-examine the Board as to the existence of any personal bias at the

hearings. It is argued that if actual bias is shown by the examination of the Board, the hearing will deny due process. Petitioners argument may have some validity where it can present some evidence of bias as a foundation for the inquiry. Here, however, Petitioners presented no evidence of any sort as a basis for such an inquiry, so that the proposed cross-examination might be appropriately characterized as a "fishing expedition." [1]

This proposed inquiry is infirm for another reason. Petitioners' allegations of bias do not distinguish between members of the Board, and are in some respects another aspect of Petitioner's attack on the structure of the Ferguson Act. Even if bias were shown as to the Board as a whole, the Board cannot disqualify itself, because there is no other body statutorily permitted to make the determinations required by the Ferguson Act. *Bell* v. *Board of Trustees*, 34 Ohio St.2d 70, 296 N.E.2d 276 (1973). The parameters of this "rule of necessity" are explored in Davis, *Administrative Law Treatise*, Section 12.04 (1958). In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court expressed its view of the rule:

> "Because of the individual relation of the members of this Court to the question, thus broadly stated, we cannot but regret that its solution falls to us. . . . The plaintiff was entitled by law to invoke our decision . . . and there was no other appellate tribunal to which under the law he could go. . . . In this situation, the only course open to us is to consider and decide the cause—a conclusion supported by precedents reaching back many years." *Id.* at 247-248.

---

[1] Petitioners argue that the Board and bus drivers were adversaries because of the refusal of the Board to acquiesce in their desire for collective bargaining and that by sending the statutory strike notices they had shown that they had prejudged the issue of whether a particular employee was engaged in the strike. The lack of merit of these contentions has been discussed above. Similarly, they do not constitute a basis for a finding that further examination of the Board members is warranted.

The Board must make the decision, regardless of any actual or asserted disqualifications of its members, because there is no one else to do it. For this reason the examination of the Board as requested by Petitioners is irrelevant to any decision which might be made by the Board.

The lack of substance of Petitioner's proposed inquiry is emphasized by the answer made by President Cook of the Board when asked if "you have made up your mind that these people are on strike . . . ?" After ruling that the matter was irrelevant to any issue before the Board at the hearing, he answered, "No, I have not."

Even if it is assumed that it was error for the Board to exclude this inquiry, that ruling did not prejudice Petitioners. The findings of the Board are supported by the records in each of the individual cases. The Board had before it evidence establishing as a factual matter in each case that the person involved was on strike within the meaning of the Ferguson Act. Petitioners presented no evidence to rebut this evidence. It is clear that a finding of a violation of the Ferguson Act was not only justified but unavoidable in each of these cases. Under these circumstances the denial of the opportunity to engage in an unfounded and unsupported effort to question "the qualifications" of the members of the Board to sit in the proceedings was not a denial of due process.

C. Respondent Did Not Deny Due Process When Its President Ruled on Objections While Employee's Counsel Questioned Him.

It is clearly an unusual circumstance which would result in the presiding officer of a public hearing taking the witness stand. However, in this situation School Board President Cook was called to the stand to present substantive evidence only to the extent of identifying a telegram sent to the Board through him as its President.

On cross-examination Petitioners sought to examine him with respect to his alleged bias and with respect to the procedural steps which the Board had taken to invoke the Ferguson Act. Since no evidence had been introduced as a foundation for these inquiries, and they were otherwise irrelevant to a Ferguson Act hearing, Cook, as presiding officer at the hearing, properly upheld the objections to the questions.

While Petitioners assert that this is a flagrant violation of justice, this does not indicate any bias on the part of the President or the Board for the reasons discussed in detail in the proceeding two sections. Of course, some questions may be appropriate if a proper foundation is established by the introduction of some evidence tending to show bias or the failure of the Board to act properly. But no such evidence was presented here. No specific allegation of bias or faulty procedure was made. Under these circumstances, the President prevented unwarranted delay in the proceedings by excluding irrelevant questions. The circumstances would have been no different had another member of the Board been presiding during Cook's testimony. Therefore, these exclusions are fully appropriate, and did not deny due process to Petitioners.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioners Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DINSMORE, SHOHL, COATES & DEUPREE
By GREGORY L. HELLRUNG
and
RENDIGS, FRY, KIELY & DENNIS
By ROBERT M. GALBRAITH
Attorneys for Respondent

APPENDIX A

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-721428

In the Matter of the Appeal of
MARY ANDERSON, et al.,

Appellant,

v.

BOARD OF EDUCATION
Princeton City School District,

Appellee.

and

No. A-721429

In the Matter of the Appeal of
AUDREY L. BURKE, et al.,

Appellant,

v.

BOARD OF EDUCATION
Princeton City School District,

Appellee.

MEMORANDUM OPINION

NURRE, J.:

This matter is before the Court on appeal from a decision of the Princeton Board of Education finding appellants on strike in violation of Section 4117.01-4117.05, inclusive, of the Revised Code of Ohio and terminating their employment.

Appendix A

The Court has reviewed the extensive briefs of the parties, the oral arguments of counsel, and the appropriate authorities and finds that the judgment entered by the Board of Education was proper and correct in all respects and that said decision is hereby affirmed.

Counsel is hereby requested to present an entry in accordance with this ruling.

* * * * *

APPEARANCES:

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By: PETER J. GEE,
42 East Gay St., Columbus, Ohio 43215
Attorneys for Appellants,

DINSMORE, SHOHL, COATES & DEUPREE
By: HAROLD S. FREEMAN
2100 Fountain Square Plaza, Cincinnati, Ohio 45202

and

RENDIGS, FRY, KIELY & DENNIS
By: ROBERT M. GALBRAITH,
907 Central Trust Tower, Cincinnati, Ohio 45202
Attorneys for Appellee.

March 5, 1974.

CHAPTER 2506: APPEALS FROM ORDERS OF ADMINISTRATIVE OFFICERS AND AGENCIES

§ 2506.01 Appeal from decisions of any agency of any political subdivision.

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

A "final order, adjudication, or decision" does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

§ 2506.02 Filing of transcript.

Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall, upon the filing of a praecipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and

taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of costs of the appeal.

§ 2506.03 Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from;[,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

§ 2506.04 Finding and order of court.

The court may find that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication or decision, or remand the cause to the officer or body appealed from with instructions to enter an order consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law pursuant to sections 2505.01 to 2505.45, inclusive, of the Revised Code.